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CURIOSITIES OF THE LAW

THE LAW AND DEAD BODIES

Anomalous as it may seem at first blush, there are few issues in the field of jurisprudence as live as that concerning dead bodies. Whether or not a property right may inhere in a corpse, and if so, whether it constitutes real or personal property, has been a much mooted question.

The courts have almost uniformly held there are no property rights in the strict sense, or in the ordinary use of the term, in the dead body of a human being.¹ However, the courts have always recognized a quasi-property right in the corpse which gives some appointed person the right to inter the remains.²

¹ In re Wong Yung Quy, 2 Fed. 624, 6 Sawy. 422; Bessemer Land etc. Co. v. Jenkins, 111 Ala. 135, 18 S. 565, 56 AmSR 26; Enos v. Snyder, 131 Calif. 68, 63 P. 170; Palenzke v. Bruning, 98 Ill. A. 644; Orr v. Dayton, etc., Traction Co., 173 Ind. 40, 96 N. E. 462; Hockenhammer v. Lexington, etc., R. Co., 74 S. W. 222; 23 Ky. L. 2383; Neighbors v. Neighbors, 112 Ky. 161; Painter v. U. S. Fidelity etc. Co., 123 Md. 301, 91 A. 158; Weld v. Walker, 130 Mass. 422, 39 Am. R. 465; Meiger v. Driscoll 99 Mass. 281, 96 Am. D. 759; Doxtator v. Chicago etc. R. Co., 120 Mich. 596, 79 N. W. 922; 45 L. R. A. 535; Keys v. Konkel, 119 Mich. 550, 78 N. W. 694; Beaulieu v. Great Northern R. R. 103 Minn. 47, 115 N. W. 353; Larson v. Chase, 47 Minn. 307, 50 N. W. 238; Wall v. St. Louis etc., RR. 184 Mo. A. 127; 168 S. W. 267; Wilson v. St. Louis etc., RR. Co., 160 Mo. A. 649; 142 S. W. 775; Litteral v. Litteral 131 Mo. A. 306, 111 S. W. 872; Guthrie v. Weaver, 1 Mo. A. 136; Wilson v. Reed, 74 N. H. 322, 68 A. 37; Page v. Symonds, 63 N. H. 17; Smith v. Shepherd, 64 N. J. Eq. 401, 54 A. 806; Toppin v. Moriarity, 59 N. J. Eq. 115, 44 A. 469; Finley v. Atlantic Trans. Co., 220 N. Y. 249; Has-selbach v. Mt. Sinai Hospital, 173 App. Div. 99, 159 N. Y. S. 471; Danahy v. Kellogg, 70 Misc. 25, 126 N. Y. S. 444; Buchannon v. Buchannon, 28 Misc. 261, 59 N. Y. S. 810; Snyder v. Snyder, 60 How. Pr. 368; Matter of Brick Presb. Church, 3 Edw. 155; Matter of Beakman Street, 4, Bradf. Surr. 503, Floyd v. Atlantic Coast Line RR. Co., 167 N. C. 55, 83 S. E. 12; Kyles v. So. RR. Co., 147 N. C. 394, 61 S. E. 278; Hadsell v. Hadsell, 7 Ohio Cir. Ct. 196; Long v. Chicago etc., RR. Co., 15 Okl. 512, 86 P. 289, 6 L. R. A. NS. 883, 6 Ann. Cas. 1005.

² Deavors v. Southern Express Co., 76 S. 288; Neighbors v. Neighbors, 112 Ky. 161, 65 S. W. 607 23 Ky. L. 1433; Medical College v. Rushing, 1 Ga. A. 57 S. E. 1083; Painter v. U. S. Fidelity etc. Co., 123 Md. 301, 91 A. 158; Beaulieu v. Great Northern R. R. Co. 103 Minn. 47, 114 NW 353, 19 LRANS 564, 14 Ann. Cas. 462; Wall v. St. Louis, etc., R. Co. 184 Mo. A. 127, 168 SW 257; Wilson v. St. Louis, etc., R. Co. 160 Mo. A. 649, 14 SW 775; Litteral v. Litteral 131 Mo. A. 306, 111 SW 278; Buchanan v. Buchanan 28 Misc. 261, 59 NYS 810; Floyd v. Atlantic Coast Line R. Co. 167 N. C. 55, 83 SE 12, LRA 1915 B 5191 Kyles v. Southern R. Co. 147 N. C. 394, 61 SE 278; Hackett v. Hackett 18 R. I. 155, 26 A. 42, 49 AmSR 762, 19 LRA 568; Pierce v. Swan Point Cemetery 10 R. I. 227, 14 AmR 667; Gray v. State 65 Tex. Cr. 90, 114 SW 635, 22 LRANS 513; Koerber v. Patek 123 Wis. 453, 102 NW 40, 68 LRA 566; Miner v. Canadian Pac. R. Co. 3 Atla. L. 408, 413, 15 West LR 161.

This interest is circumscribed with exactness. The right is only that of burial and cannot be deviated from to the extent of disposing of the body in any purpose other than that of interment, whether for pecuniary gain or not.³

This was not always the case. In ancient Egypt a son could borrow money by hypothecating his father's body.⁴ Perhaps it is just as well that this interesting convention that is no longer conventional has passed into oblivion with the people who were most acquainted with it. This, because the Egyptian methods for embalming have been kept in the knowledge of no one with the exception of the Sphinx whose stone lips never move.

When a debtor said "Well, you'll collect that over my dead body!" in the Middle Ages it could be taken quite literally. For in some portions of Europe during that period the creditor was permitted to levy upon the body of his defunct deceased debtor.⁵ Perhaps the easiest position in those primitive states was that of grave-digger of the Potter's Field, for if such were the rights of the creditor it is hard to imagine any bankrupt deceased becoming a dead-weight upon the hands of the state officials. But conversely, the position of sheriff presented difficulties which we will leave to the reader's kind consideration.

Coming down to present-day adjudications we find that there is not set, staunch rule governing this matter. Equity presents the only method for remedy or relief in such cases⁶ and each case is decided solely upon its own merits.⁷ The right of sepulture is not absolute, but when in conflict with public policy or where justice demands a subordination, it must yield.⁸

³ Matter of Beekman St., 4 Bradf. Surr. (N. Y.) 503; Long v. Chicago etc. R. Co., 15 Okla. 512, 86 P 289, 6 LRANS 883, 6 Ann. Cas. 1005.

⁴ Matter of Beekman St., Supra.

⁵ Pettigrew v. Pettigrew. 207 Pa. 313, 56 A 878, 99 AmSR 795, 64 LRA 179.

⁶ Pettigrew v. Pettigrew. Supra, (Wynkoop v. Wynkoop, 42 Pa. 293, 82 AmD 506) (Holding that where the lot in which the husband and a later deceased child were buried was not large enough for the widow to be buried, and the relations between the widow and the husband's family were strained, she could remove his body to a lot owned by her); Cooney v. Lawrence, 11 Pa. Co. 79.

⁷ Gray v. State, 55 Tex. Cr. 90, 114 SW 635, 22 LRANS 513.

⁸ Me.—Pulsifer v. Dauglass, 94 Me. 556, 48 A 118, 53 LRA 238.

Minn.—Larson v. Chase, 47 Minn. 307, 50 NW 236, 28 AMSR 370, 14 LRA 35.

N. H.—Wilson v. Read, 74 N. H. 322, 68 A 37, 124 AmSR 973, 16 LRA N S 332.

N. J.—Toppin v. Moriarty, 59 N. J. Eq. 115, 44 A. 469.

N. Y.—Buchanan v. Buchanan, 29 Misc. 261, 59 NYS 810; Snyder v. Snyder 60 HowPr 368; Herold v. Herold, 16 OhS & CP 303; Smiley v. Bartlett 8 Oh & CP 154; Hoppe v. Cathedral Cemetery 24 Pa. Dist. 344; Fox v. Gordon 16 Phila. 119; Hackett v. Hackett 18 R. I. 155, 26 A 42, 49 AmSR 762, 19 LRA 558; Pierce v. Swan Point Cemetery 10 R. I. 227, 14 AmR 667; Wood v. Butterworth 65 Wash. 344, 118 P 212.

In determining interests the courts exercise such jurisdiction as they are wont to apply in the case of minors, infants or spendthrifts.⁹ The determination of the place of sepulture¹⁰ ordinarily is granted to the party who has the right and duty of interment.¹¹ The exercise of the above right must be executed in compliance with the dictates of custom and sentiments of the kinship.¹² The courts will also take due cognizance of the expressed wish or preference of the deceased as to place and method of burial.¹³ Even in the face of the opposition of the immediate members of the family or those close in kinship the court will often effectuate the desire of the dead person.¹⁴ In this regard it is well to note that in the case of married persons the surviving party to the union is considered, by the majority of the holdings, to have the dominant claim to the custody of the body and the designation of the place of burial of the deceased.¹⁵

Should there be no surviving husband or wife the privilege of naming the place of inhumation transcends to the progeny, if of mature age, and if their are none, to the parents of the deceased, or to brothers and sisters, or to another of the line of kinship.¹⁶ As a general rule the remains will always be given to one of the

⁹ *Enos v. Snyder* 131 Cal. 68, 63 P 170, 82 AmSR 330, 53 LRA 221, *Doxator v. Chicago etc., R. Co.* 120 Mich. 596, 79 NW 922, 45 LRA 535; *Litteral v. Litteral* 131 Mo. A 306, 111 SW 872; *Fox v. Gordon* 16 Phila. 185.

¹⁰ *Infra*.

¹¹ As No. 3 *supra*.

¹² *O'Donnell v. Slack* 123 Cal. 285, 55 P 906, 43 LRA 388; *Thompson v. Deeds* 93 Iowa 228, 61 NW 642, 35 LRA 56; *Wilson v. Read* 74 N. H. 322, 68 A 37, 124 AmSR 973, 16 LRANS 332; *Cooney v. English* 86 Misc. 292, 148 NYS 285, *In re Richardson* 29 Misc. 367, 60 NYS 539; *In re Donn* 14 NYS 189; *Johnston v. Marinus* 18 AbbN Cas 72; *Matter of Beekman St.* 4 Bradf Surr 503 Smiley v. Bartlett 6 Oh Cir Ct 234; *Pettigrew v. Pettigrew* *Supra*; *Fox v. Gordon* 6 Phila. 185; *Scott v. Riley* 16 Phila. 106; *Lowry v. Pitt* 2 Wkly N C 675; *Pierce v. Swan Point Cemetery* *Supra*; *Wood v. Butterworth* 65 Wash 344, 118 P 212.

¹³ *Infra* inst *pare*.

¹⁴ *Enos v. Snyder* *Supra*; *O'Donnell v. Slack* *supra*; *Louisville ets R. Co. v. Wilson* 123 Ga. 62, 51 SE 24, 3 Ann Cas 128; *Rushing v. State Medical College* *supra*; *Mensing v. O'Hara* 119 Ill. A. 48; *Neighbors v. Neighbors* *supra*; *Pulsifer v. Douglass* *supra*; *Painter v. U. S. Fidelity etc., Co.* 123 Md. 301, 91 A 158; *Wedi v. Walker* 139 Mass. 422, 30 Am R 465, *Durell v. Hayward* 9 Gray 248, 69 AmD 284; *Larson v. Chase* 47 Minn. 307, 50 NW 238, 28 AmSR 270, 14 LRA 85; *Wilson v. St. Louis etc., R. Co.* 160 Mo. A 649, 142 SW 775; *Litteral v. Litteral* *supra*; *Thompson v. Pierce* 95 Nebr. 692, 146 NW 948; *Smith Shepherd* 64 N. J. Eq. 401, 54 A 806; *Darcey v. Presbyterian Hospital* 202 N. Y. 259, Ann Cas 1912 D 1238; *Hasselbach v. Mt. Sinai Hospital* 173 App. Div. 89, 159 NYS 376; *Foley v. Phelps* 1 App. Div. 551, 37 NYS 471; *Mitchell v. Thorne* 57 Hun 405, 10 NYS 682; *Buchanan v. Buchanan* *supra*; *Johnston v. Marinus* *supra*; *Kyles v. Southern R. Co.* 147 N. C. 394, 61 SE 278; *Hadsell v. Hadsell*, 7 Oh Cir Ct 196; *Farley v. Carson* 8 Oh Dec 119; *Herold v. Herold* *supra*; *McGann v. McGann* 28 R. I. 130; 66 A 52; *Hackett v. Hackett* *supra*; *Wright v. Harned* 163 SW 685; *Korber v. Patek* 123 Wis. 453, 102 NW 40, 68 LRA 956.

¹⁵ *Renihan v. Wright* 125 Ind. 536; 25 NE 822, 21 AmSR 249, 9 LRA 514; *Pettigrew v. Pettigrew* *supra*.

¹⁶ 2 Cl & F 567.

kinship of the deceased rather than to a stranger to the blood.^{17a} There have even been cases holding that the bodies of the dead belong to the surviving kinsmen as property.^{17b}

As between the executor or administrator and the heirs, the latter have priority;¹⁸ but it has been held that *prima facie* the right to the possession of the body of the decedent rests in the administrator or executor until the body has been properly buried, although he has no property in it.¹⁹

But no matter to whom the body is given in custody for burial it is in the nature of a sacred trust which the judiciary will guard for the benefit of all concerned.²⁰

A rather nice distinction was that indulged in at Common Law. There it was adjudged to be larceny to convert the shroud of a deceased although the taking of the body itself was not larceny.²¹ Similarly it was held that the taking of articles of dress from a dead body washed ashore constituted larceny.²²

At the present time it is held that there cannot be larceny in the taking of a dead body because there can be no property interest therein, since the body belongs to, or is under the protection of, the public.²³ However it has been held by the Missouri courts that it is larceny if the body was in a coffin and the coffin was taken along with the body.²⁴

It is almost axiomatic that there is a duty to the public and to the decedent to give the latter a 'decent' burial.²⁵ The terms "decent" and "respectable" are relative in this regard according to the holding of the courts. Their particular connotation depends upon the social and political standing of the dead persons,

¹⁷ *Enos v. Snyder* supra; *O'Donnell v. Slack* supra; *Wright v. Hollywood Cemetery Corp.* 112 Ga. 884; 38 SE 94, 52 LRA 621; *Mensinger v. O'Hara* supra; *Neighbors v. Neighbors* supra; *Painter v. U. S. Fidelity etc. Co.* 123 Md 301, 91 A 358; *McEntee v. Bonacum* 66 Nebr 651, 92 NW 633, 38 LRA 440, *People v. St. Patrick's Cathedral* 7 Abb N Cas 121, 53 How Fr 55; *State v. Shonhoff* 70h Cir Dec 716; *Farley v. Carson* 80f Dec 119. *Wynkoop v. Wynkoop* 42 Pa 293, 82 Am D 506; *Com. v. Susquehanna Coal Co.* 5 Kulp 195 *Renihan v. Wright* 125 Ind. 536; 21 Am SR 249, 9 LRA 514.

^{17a} *Boyd v. Indianapolis* 13 Ind. 113.

¹⁸ *Enos v. Snyder* supra; *O'Donnell v. Slack* supra; *Renihan v. Wright* supra; *Griffith v. Charlotte etc., R. Co.* 23 S. C. 25; 55 AmR 1; *Koerber v. Patek* supra; *Pettigrew v. Pettigrew* supra.

¹⁹ 207 Pa. 313

²⁰ *Infra.*

²¹ 13 Pick (Mass.) 402.

²² 25 Cyc 23.

²³ 68 Mo. 208.

²⁴ *Rader v. Davis* 154 Iowa 306, 134 NW 849, 38 LRANS 131; *Litteral v. Litteral* supra; *Finley v. Atlantic Transport Co.* 221 N Y 249, 115 NE 715, LRA 1917 E 852, Ann Cas 1917 D 726; *People v. St. Patrick's Cathedral* supra; *Com. v. Eusquehanna Coal Co.* supra; *Fox v. Gordon* supra; *Scott v. Riley* supra.

along with the religious or fraternal alignments which they may have formed during their lifetime.²⁶ What would be correct in one case might be insufficient, or even actionable, in another.

Damages for mental anguish caused by the invasion of the different rights relating to the dead body are recoverable, according to the well settled rule.²⁷ Such mental anguish must flow naturally and probably from the injuries visited upon the corpse.²⁸ It is not necessary to show that there was any actual pecuniary loss²⁹; at common law it was an offense to treat the dead human body indecently.³⁰ The mutilation of a dead body has always been held to be sufficient incentive to the element of mental anguish necessary to recover damages thereon.³¹

Therefore, as we have seen, there can really be no property rights as we usually regard them, in the case of situations arising around the legal status of dead bodies and those who may wish to have their custody. The real and personal property rights do not exist. Rather it is a matter for equity jurisprudence and each case is adjudicated strictly upon its own merits.

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²⁶ *Seaton v. Com* 149 Ky 498, 149 SW 871, 42 LRANS 211.

²⁷ *Birmingham Transfer etc., Co. v. Still* 7 Ala A 556, 61 S 611; *Wright v. Hollywood Cemetery Corp.* supra; *Wall v. St. Louis etc., R. Co.* 184 Mo A 127, 168 SW 257; *Finley v. American Transport Co.* supra; *Hasselbach v. Mt. Sinai Hospital* supra.

²⁸ *Hockenhammer v. Lexington etc., R. Co.* 74 SW 222, Ky L 2383; *Gatzow v. Buening* 106 Wis. 1, 31 NW 1003, 80 AmSR 1, 47 LRA 475.

²⁹ *Medical College v. Rushing* supra; *Mensing v. O'Hara* supra; *Marson v. Chase* supra; *Darcy v. Presbyterian Hospital* supra.

³⁰ *People v. Baumgartner* 135 Cal. 72, 66 P 974.

³¹ *Besmer Land etc., Co. v. Jenkins* 111 Ala 135, 18 S 565, 56 AmSR 26; *Meyers v. Clarks* 122 Ky 866, 90 SW 1049, 28 Kl L 1000, 93 SW 43, 29 Ky L 393, 5 LRANS 727.

Minn.—Beaulieu v. Great Northern R. Co., 103 Minn. 47, 114 NW 353, 19 LRANS 564, 14 Ann Cas 462.

Mo.—Wall v. St. Louis, etc., R. Co., 184 Mo. A. 127, 168 SW 257.

N. Y.—Darcy v. Presbyterian Hospital. 202 N. Y. 259, 95 NE 695, Ann Cas 1912 D 1238 (rev 137 App. Div. 924 mem, 122 NYS 1126 mem); *Hasselbach v. Mt. Sinai Hospital*; 173 App. Div. 39, 159 NYS 376; *Hassard v. Lehane*, 143 App. Div. 424, 138 NYS 161.

N. C.—Kyles v. Southern R. Co., 147 N. C. 394, 61 SE 278.

Wash.—Wright v. Beardsley, 46 Wash. 16, 89 P 172.